

CANADA / JUDGMENT

Bank Canadian National et al. v. Gingras

[1977] 2 SCR 554

COURT

Supreme Court of Canada

DECIDED

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Supreme Court Judgments

Date

1977-01-25

Report

[1977] 2 SCR 554

Judges

Pigeon, Louis-Philippe; Martland, Ronald; Ritchie, Roland Almon; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Quebec

Subjects

Bills of exchange

Decision Content

Supreme Court of Canada

Bank Canadian National et al. v. Gingras, [1977] 2 S.C.R. 554

Date: 1977-01-25

Bank Canadian National and Raynald Bérubé (Defendants) Appellants;

and

Paul Gingras (Plaintiff) Respondent.

1976: March 5 and 6; 1977: January 25.

Present: Pigeon, Martland, Ritchie, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bills of exchange—Cheques—Depositing to personal benefit of president of cheques drawn to the order of the company—Unauthorized endorsements—Fault—Damages equal to amount of cheques—Remedy against the president, the bank and its manager—No remedy against the drawer—Bills of Exchange Act, R.S.C. 1970, c. B-5, ss. 10, 51—Civil Code, art. 1053.

Marcel Desjardins was convicted of depositing to his personal benefit cheques drawn to the order of B/D Construction Limitée, of which he was the president, on the basis of his endorsement alone, which was not legally authorized. The Superior Court also gave judgment for respondent, the trustee in bankruptcy of B/D Construction Limitée, for \$35,338 against Desjardins, the B.C.N. and the branch manager Raynald Bérubé jointly and severally. The present appeal is against a unanimous decision of the Court of Appeal, which affirmed the judgment of the Superior Court convicting appellants of committing a quasi-delict by accepting this procedure without examining it, and without verifying the endorsement before debiting the drawer, the City of Charlesbourg.

Held: The appeal must be dismissed.

By depriving B/D Construction Limitée of money that belonged to it appellants committed a “fault” within the meaning of art. 1053 of the Civil Code, and since damage was caused thereby, this fault gives rise to a claim for damages under that article. This is the case which Duff C.J. contemplated in *Norwich Union Fire Insurance Society Ltd. v. La Banque Canadienne Nationale and the City of Chicoutimi*, [1934] S.C.R. 596. The Bank had been exonerated, however, because its wrongful payment had not caused any damage to the beneficiary, which retained all its remedies against the drawer. In the case at bar the situation is different since the cheques were given for the price of work done by the company, which had regularly received them in payment and could no longer have a remedy against the drawer when the cheques were subsequently fraudulently cashed by its president. The Quebec courts were correct in considering that the only remedy was against the president of the company, and against the bank and its manager who by their fault contributed to his obtaining payment that he was not authorized to obtain.

Norwich Union Fire Insurance Society Ltd. v. La Banque Canadienne Nationale and The City of Chicoutimi, [1934] S.C.R. 596, followed; *Banque Canadienne Nationale v. Tremblay* (1938), 64 Que. K.B. 170; *Choinière v. La Banque d’Épargne de la Cité et du District de Montréal*, [1957] Que. Q.B. 467, referred to; *Banque Royale v. Concrete Column Clamps*, [1977] 2 S.C.R. 456, distinguished.

APPEAL from a judgment of the Court of Appeal of Quebec affirming the judgment of Deschênes J. of the Superior Court. Appeal dismissed.

Michel Deschamps, for the appellants.

Pierre Jolin, for the respondent.

The judgment of the Court was delivered by

PIGEON J.—The appeal is against a unanimous decision of the Court of Appeal of Quebec which affirmed the judgment of the Superior Court pronounced against the appellants and one Marcel Desjardins.

Deschênes J.A. gave the reasons for the decision:

[TRANSLATION] The Superior Court found that Desjardins had fraudulently diverted to his benefit the proceeds of certain cheques issued to the order of B/D Construction Ltée, of which he was president, and that he achieved his purpose as a result of the carelessness of the B.C.N. and the managers of its branches at St-Pacôme and Ste-Anne-de-la-Pocatière. Besides a personal condemnation of \$81,226.16 against Desjardins, which does not concern us here, the Superior Court gave judgment for Gingras, the trustee in bankruptcy of B/D Construction Ltée, for \$35,338.54 against Desjardins, the B.C.N. and Bérubé jointly and severally, and for \$1,388.90 against Desjardins, the B.C.N. and Morency, also jointly and severally.

...

Desjardins committed a delict, repeated several times, by converting to his own benefit cheques drawn to the order of B/D Construction Ltée, either by depositing the entire amount in his personal account, or by depositing part and making a cash withdrawal of the corresponding amount.

The B.C.N. and its managers committed a quasi-delict by accepting this procedure without examining it, and without verifying the sufficiency of the endorsement on the various negotiable instruments before debiting the drawer, the City of Charlesbourg.

Having rejected a plea of prescription which was not renewed in this Court, Deschênes J.A. continued:

[TRANSLATION] B/D Construction Ltée had no account in the branches of the B.C.N. which Bérubé and Morency managed in St-Pacôme and Ste-Anne-de-la-Pocatière. B/D Construction Ltée did business with the Provincial Bank in St-Jean-Port-Joli.

Neither of the branches of the B.C.N. had a copy of a resolution of B/D Construction Ltée authorizing the signing and endorsement of negotiable instruments.

Nevertheless, the two branches agreed to pay cheques drawn to the order of B/D Construction Ltée solely on the company's endorsement by Marcel Desjardins.

One manager, Bérubé, offered no explanation, and admitted paying \$6,000 in cash on the basis of the initials of a secretary alone.

The other manager, Morency, took refuge in the fact that, for two years, the Provincial Bank had always honoured the cheques of B/D Construction Ltée signed by Marcel Desjardins alone; he had concluded from this that the latter was the authorized signer. However, the evidence disclosed, on examination of hundreds of cheques, that all—save a couple of exceptions—bore two signatures: Marcel Desjardins and Henri Blouin.

A contradiction appeared in the evidence on the question of authorization of the signatures by B/D Construction Ltée for banking purposes. In the minutes of January 19, 1960, there is a resolution (P-11) authorizing Marcel Desjardins and Henri Blouin to sign and endorse negotiable instruments. However, in the Provincial Bank's file, a copy of the same resolution (D-1) authorizes Marcel Desjardins or Henri Blouin.

The trial judge found that the copy D-1 was in error and that the true authorization, requiring two signatures, was contained in the minute P-11. In the light of the evidence, the trial judge was correct. The instruments negotiated by Marcel Desjardins never had a valid endorsement. In any case, this question raised by appellants is academic, since neither of the two managers ever bothered to look into this resolution or was ever familiar with it in either of its versions. They should especially have insisted on doing so, as s. 51 of the Bills of Exchange Act takes pains to provide:

51. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

Appellants submitted in their factum (p. 11) “that everyone must bear the risk of signatures which can be verified at the time the instrument is negotiated...”; it was precisely the failure to comply with this obligation which brought about appellants' liability: *Banque Canadienne Nationale v. Tremblay*, [1938] Qué. Q.B. 170, and *Choinière v. La Banque d'Épargne de la Cité et du District de Montréal*, [1957] Qué. Q.B. 467.

It is true that in *Norwich Union Fire Insurance Society Ltd. v. La Banque Canadienne Nationale and The City of Chicoutimi*, [1934] S.C.R. 596, the Bank was exonerated because its wrongful payment had not caused any damage to the beneficiary, and the latter retained all its remedies in payment against the drawer, its debtor (the City of Chicoutimi). Rinfret J. stated, in particular (p. 607):

The appellant might have a claim for certain damages against the respondent, on the ground that, through the latter's negligence, it deprived the appellant of the advantage resulting from the possession of the cheques. But I am in entire agreement with My Lord the Chief Justice that, clearly, the appellant has not the right, which it has attempted to assert, of securing the payment of the amounts represented by the cheques under the guise of a claim for damages, if it still retains its full recourse for the premiums against the city of Chicoutimi. Such however would be the situation if, as the appellant contends, Vézina's endorsements were unauthorized and, consequently, null and void (Bills of Exchange Act, ss. 49, 139, 166). Under those circumstances, the appellant's rights against the city of Chicoutimi are still alive and its original cause of action

for the premiums is unaffected.

It follows that the appellant's loss, if any, is not the loss it has claimed in the premises and in respect of which the whole trial has been exclusively conducted.

The respondent has a very clear interest in insisting that it should be called upon to account for the impugned cheques only towards the city of Chicoutimi, out of whose funds the cheques were paid. As between the bank and the city, there may be reasons why the city is precluded from disputing Vézina's authority to cash the cheques and the bank's right to charge them to the city's account. On all those questions, the real debate is between the bank and its customer, not with the appellant.

The action as brought could not be maintained and the appeal must be dismissed with costs.

However, the situation is completely different here. In para. 10 of its amended statement, respondent alleges that appellants, by their fault, deprived B/D Construction Ltée of money which belonged to that company. Thus, the five cheques in question had been issued by the City of Charlesbourg and were debited to it, in turn, by the B.C.N. on which it had drawn them.

This is the case which Duff C.J. contemplated in *Norwich Union* (supra), at p. 600:

Now, these documents, as already observed, were in the hands of Vézina as agent of the appellants. They were the appellants' property. Unless Vézina had authority, I shall have a word to say about this later, to endorse and deliver them to the bank for deposit to the credit of the account mentioned, he was committing a wrongful act in doing so. The bank, as we shall see, was bound to know this. In such a case, unless the agent possessed such authority, a bank, taking a cheque, marking it paid, treating it in such a way as to make it appear on its face as a cancelled cheque and returning it to the drawer, would prima facie, be wrongfully and unlawfully dealing and interfering with the property of the agent's principal; and, therefore, would be committing a 'fault' by 'positive act' within the meaning of art. 1053 C.C.; and if damage was caused thereby such conduct might constitute an actionable wrong under the article.

It is also the situation which arose in the decisions of this Court disposing of *B.C.N. v. Tremblay* (supra) and *Choinière v. La Banque d'Épargne* (supra).

Appellant's whole argument in this case rests on *Norwich Union*[1], so that the only question to be examined is whether the Quebec courts were correct in making a distinction, as they earlier did in *Banque Canadienne Nationale v. Tremblay*[2] and in *Choinière v. La Banque d'Épargne de la Cité et du District de Montréal*[3]. As we have seen, respondent's action is based solely on a delict committed by the defendant Marcel Desjardins, which consisted of diverting to his benefit sums belonging to B/D Construction Ltée by depositing to his personal benefit cheques made out to the order of the latter, on the basis of his endorsement alone, which was not legally authorized.

Appellants were condemned for having committed a quasi-delict by consenting to this procedure without questioning it. In other words, the Superior Court and the Court of Appeal condemned them for fault under art. 1053 of the Civil Code. This method of reasoning appears to me to be entirely in accordance with French authorities on this question. Thus, in *Sirey* 1934.2.127, in the summary of a decision of the Court of Appeal of Douai, one reads:

[TRANSLATION] 1. The banker instructed to pay a crossed cheque made out to a city commits a fault, if he allows this cheque to be endorsed by the mayor of the city, and commits another fault if, having paid this cheque, he credits the amount to the personal account of the mayor of the said city, thus putting the latter in a position to freely use a sum which does not belong to him ...

The actions which were the subject of the decision in *Norwich Union* were brought against the Bank and the Municipality, which was impleaded. One was an attachment in revendication of a cheque which the Municipality had countermanded. It appears clear to me that the quashing of the attachment of this countermanded cheque has no bearing on the question raised in the case at bar. Moreover, the unanimous decision of the Court was that the appeal should be quashed for want of jurisdiction.

The principal allegations and conclusions of the other action read as follows:

3. On or about the specific dates hereinafter mentioned the *Mis-en-Cause*, the said City of Chicoutimi, handed to the said P. VEZINA, its then mayor and the local insurance agent of Plaintiff, certain cheques drawn by the said *Mis-en-Cause*, the City of Chicoutimi, on the Defendant Bank, Chicoutimi Branch, and made payable to Plaintiff as follows:—
 - (a) Cheque No. 12847 dated Dec. 18, 1930, for \$2,775.29;
 - (b) Cheque No. 13127 dated March 19, 1931, for \$2,274.66;
 - (c) Cheque No. 13338 dated May 21, 1931, for \$2,230.19;
4. The said cheques were, on or about the various dates they bear, negotiated by the said P. VEZINA, without any authorization whatsoever from Plaintiff, and said unauthorized endorsement being recognized and accepted by the Defendant Bank which credited Vézina's private account with the proceeds thereof, having appropriated funds of the *Mis-en-Cause*, the City of Chicoutimi, then standing to the credit of the said *Mis-en-Cause* in the Chicoutimi branch of the Defendant Bank, the whole as more fully appears from the said cheques now allegedly cancelled but in the possession of the *Mis-en-Cause*, the City of Chicoutimi, which is hereby called upon to produce same, and Plaintiff further alleges that Defendant Bank acquired no title to the said cheques by the said unauthorized endorsement, which said cheques were and are the property of Plaintiff;
5. To the knowledge of the Defendant Bank, its preposes, agents and representatives, the said P. VEZINA had no authority from Plaintiff to negotiate said cheques and through the fault, negligence, complicity and connivance of the said employees and representatives of the Defendant Bank, acting in the ordinary course of their duties, and for whom said Defendant

was responsible, Plaintiff has suffered loss and damage in the aggregate of the sum and total of said cheques, to wit, \$7,380.14 together with legal interest thereon amounting to \$284.31, or a total sum to date of \$7,664.45;

6. Plaintiff under reserve of its rights to claim any additional sums or exercise such further rights as may appear to be due or accruing to it and without waiver of its recourse against the said P. VEZINA or against the Mis-en-Cause the City of Chicoutimi, has a right in the premises to claim the aforesaid sums from Defendant;
7. The said P. VEZINA who did his Banking with Defendant, to the knowledge of Defendant, through its agents, preposes and representatives, was in straitened financial circumstances at the time the cheques were negotiated and has since ceased to meet his payments;

... WHEREFORE Plaintiff prays that the Mis-en-Cause be summoned in order that it may have cognizance of the present action and aforesaid averments, and further prays that it be declared that the said cheques were and are the property of Plaintiff, and that Defendant acquired no title thereto, and furthermore, that Defendant be condemned to pay Plaintiff the aggregate sum of said cheques, with legal interest thereon to date, amounting to \$7,664.45, the whole with interest and costs, including costs of exhibits and travelling expenses of all witnesses, against Defendant, and with said costs against the Mis-en-Cause only in the event of contestation.

It is not easy to discern the precise reason for the dismissal of this second action. In fact, although the judgment was unanimous, different reasons were expressed by Duff C.J., Lamont J. concurring, by Rinfret J., Crocket J. concurring, and by Cannon J. The latter found that Vézina had authority to endorse the cheques. He stated (at p. 608):

I, therefore, agree with the learned trial judge and the Chief Justice of Quebec that, under the circumstances disclosed by the proof, the authority vested in Vézina to collect premiums due to the plaintiff and grant discharges included the right to endorse cheques for the purpose of making the collection of his commission and of the moneys to be remitted to the plaintiff sixty days after the issue of the policies or when the amount due for workmen's compensation premiums would be finally adjusted. When the cheques in question issued, no premiums were actually due by the city of Chicoutimi to the plaintiff, but Vézina secured payments in advance, for his own accommodation and convenience.

The fact that the cheques were issued when there was nothing due to Norwich Union was also noted by Duff C.J., but he did not agree that Vézina had the right to endorse them, and as may be seen (at p. 600) in the passage quoted by Deschênes J.A., he expressed the opinion that an action such as the one which this Court must now decide should succeed.

... In such a case, unless the agent possessed such authority, a bank, taking a cheque, marking it paid, treating it in such a way as to make it appear on its face as a cancelled cheque and returning it to the drawer, would, prima facie, be wrongfully and unlawfully dealing and interfering with the property of the agent's principal; and, therefore, would be committing a "fault" by "positive act" within the meaning of art. 1053 C.C.; and if damage was caused thereby such conduct might constitute an actionable wrong under that article.

He concluded that Norwich Unions action must fail because he reached the conclusion that the action was not founded on that basis. He said, at p. 603:

I have, nevertheless, been forced to the conclusion that the appellants are not entitled to succeed on the case advanced by them at the trial, in the Court of King's Bench, and, indeed, here. I shall not elaborate the reasons; the specific rules of the common law under the heading of "conversion" are not, I am satisfied, specifically in force in the province of Quebec under the civil code. I add that qualification, not because of any particular exception in my mind at present, but because in Quebec as in other parts of Canada, there are very considerable fields of law governed by Dominion statutes, or outside the provincial domain, and I wish to avoid pre-judging any question which might arise in respect of transactions in those fields.

Notwithstanding the wide power of amendment vested in us, this is not, I think, a case in which that power could be advantageously used. We could not permit, on the record as it stands, a claim to be advanced on the basis which I have indicated above;...

And he concluded (at p. 604):

Art. 1053 C.C., however, does not, apparently, embrace within its ambit the specific doctrines of "conversion" as understood by common lawyers; and, assuming the appellants might, on a case aptly framed and presented, be entitled to recover some substantial sum by way of damages against the bank, still, for the purpose of determining damages, other considerations would come into play, such, for example, as the value of the appellants' rights against the municipality of Chicoutimi.

Rinfret J., with whom Crocket J. concurred, began by noting (at p. 605) that the trial judge and the majority on appeal found that Vézina had the right to endorse the cheques, and added (at p. 605):

The finding is based, as I understand it, not particularly on the interpretation of the contract between Vézina and the appellant, but on the weight of all the circumstances established in evidence. While I feel that due consideration would have to be given to the concurrent judgments, I fully appreciate the importance of the observations of the Chief Justice on that point and, like him, I think it is sufficient to say that the appeal fails "on the case advanced by the (insurance company) at the trial."

It should be emphasized that actions in conversion are unknown to the law of Quebec (Corporation Agencies Limited v. Home Bank of Canada, [1925] S.C.R. 706, at p. 722). It follows that most of the English cases relied on by the appellant have no application here.

Finally he concluded, at p. 607, with the passage quoted by Deschênes J.A., in which, without explicitly stating that he held the endorsements to be authorized, he expressed agreement with the Chief Justice and stated that Norwich Union could not, in that case, claim the amount of the cheques as damages.

It follows that the appellant's loss, if any, is not the loss it has claimed in the premises and in respect of which the whole trial has been exclusively conducted.

With respect to a possible remedy against the drawer of the cheques, the situation in the case at bar is quite different from what it was in Norwich Union. It must not be forgotten that there, cheques had been issued when no money was due. Moreover, the agent, Vézina, had the right to deduct a commission. He was not a party to the action and it was not shown that he owed the full amount of the cheques.

In the case at bar, action was brought against the person who made the unauthorized endorsements and he was condemned to pay the full amount of the cheques. It is clear that they were given for the price of work done by the company, and that they reached the company. Its president certainly had the right to receive them, although he did not have the power to appropriate them. Therefore, I think that we must conclude that these cheques, for which provision was made, were worth the full amount for which they were issued in the hands of the company. I do not think that the company, which had regularly received them in payment of the debt due to it, could have a remedy against the drawer because these cheques were subsequently fraudulently cashed by its president. The situation is not the same as in *Royal Bank v. Concrete Column Clamps*[4], in which the issue was the remedy of a client against his banker.

In my opinion, in the circumstances of the case at bar, the Quebec courts were correct in considering that the only remedy was against the president, who misappropriated the money, and those who by their fault contributed to the conversion, that is, the manager of the bank and the bank which took the cheques for the personal account of Desjardins and obtained payment of them for him. Moreover, I believe that Deschênes J.A. was correct in holding the bank and its manager to be prohibited from relying on a defence which would reflect back on them. Thus, assuming that respondent could have claimed the amount of the cheques from the municipality which was the drawer, it is clear that the latter would have had a remedy against appellants, as Deschênes J.A. observed:

[TRANSLATION] It is at least doubtful that B/D Construction Ltée could still have a remedy in payment against the City of Charlesbourg, and even then, it would trigger a circuit of actions in guarantee which it is not in the interest of justice to cause, when the whole matter can be dealt with in the direct action before this Court.

In my opinion, in the case at bar, the lower courts did not err in ruling that the company had, by the fault of appellants, suffered damage equal to the amount of the cheques. Having regard to the facts and the nature of the action brought, the application of the principles set out by Duff C.J. in *Norwich Union* leads to the conclusion which the Court of Appeal approved.

Although it is in no way necessary in the case at bar, in view of the basis on which it was brought and decided, I see no reason to refrain from saying that I am not completely sure it was correct to state in *Norwich Union* that the common law rules on conversion could not be applied in Quebec. In fact, not a word was said of s. 10 of the Bills of Exchange Act, and no reference to it is to be found in the factums, although appellant's whole argument was based on English cases. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Reinhardt, Deschamps & Lebel, Montreal.

Solicitors for the respondent: Dorion, Dorion, Jolin & Champoux, Quebec.

[1] [1934] S.C.R. 596.

[2] (1938), 64 Que. K.B. 170.

[3] [1957] Que. Q.B. 467.

[4] [1977] 2 S.C.R. 456.

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